

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re	)	
	)	
Application of Consent for Assignment of	)	
Fifty Broadband Personal Communication	)	
Services Licenses	)	
	)	
Filed by	)	WT Dkt. No. 03-19
	)	
NORTHCOAST COMMUNICATIONS,	)	DA-03-172
LLC	)	
	)	File Nos. 0001138904, 0001138905,
	)	0001138909 (lead application)
And	)	
	)	
	)	
CELLCO PARTNERSHIP d/b/a	)	
VERIZON WIRELESS	)	

To: The Commission

**REPLY BRIEF OF NATIONAL ENGINEERING TECHNICAL COMPANY TO  
NORTHCOAST COMMUNICATIONS, LLC’S OPPOSITION TO NATIONAL  
ENGINEERING TECHNICAL COMPANY’S PETITION TO DENY**

**I. Introduction**

National Engineering Technical Company (“NETCO”) hereby submits its Reply Brief to Northcoast Communications, LLC’s (“Northcoast”) Opposition to NETCO’s Petition to Deny (the “Reply Brief”) in the above-referenced matter. NETCO petitioned the Federal Communications Commission (“Commission”) to deny the above-referenced application for consent to assign the licenses of Northcoast and its license subsidiaries, Boston Holding, LLC and New York PCS Holding, LLC, to Cellco Partnership (“Cellco”) d/b/a Verizon Wireless on the grounds that the proposed assignment was not in the public interest. NETCO continues to

respectfully urge the Commission to deny approval for the assignment to Celco of fifty (50) Personal Communications Services (“PCS”) licenses on the grounds that Northcoast’s failure to perform certain contractual obligations to NETCO raises public interest questions that bear on the above-captioned application. In the alternative, NETCO respectfully urges the Commission to defer action on the above-captioned application pending the outcome of the breach of contract suit presently pending in the Court of Common Pleas of Cuyahoga County, Ohio (Case No. CV 03493090) (the “Ohio Court Proceeding”). In support of this Reply Brief, the Declaration of Martin Cohen is attached hereto.

## **II. ARGUMENT**

### **A. NETCO HAS STANDING TO PETITION THE COMMISSION TO DENY THE ABOVE-REFERENCED APPLICATION**

Any interested individual or citizens’ group who objects to an assignment of PCS licenses such as those at issue in the instant matter may file a petition to deny the application. 47 U.S.C. § 309(d). The petition to deny must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that the grant of the subject application would be inconsistent with the public interest. *Id.*

NETCO believes and asserts that it is a party in interest. NETCO upgraded and expanded Northcoast’s licenses and related network assets for wireless communications throughout Ohio and the Midwest. *Paragraph 4, Complaint in Ohio Court Proceeding, verified by Declaration of Martin Cohen.* Northcoast has not paid NETCO in full for such services. *Paragraph 11, Complaint in Ohio Court Proceeding, verified by Declaration of Martin Cohen.* Interested parties have the right to petition the Commission so long as there is a direct injury, “fairly traceable” to the challenged action, and a substantial likelihood that the relief requested will redress the injury claimed. *See, e.g., Lugan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

NETCO acknowledges that if the Commission approves of the assignment of the subject PCS licenses, the decision would still leave NETCO with an available forum within which to test its rights against Northcoast, namely the Ohio Court Proceeding. However, clearly NETCO's position will be weakened once this deal is approved. For example, without the threat that NETCO's arguments and papers filed in this forum could have a bearing on and influence the Commission's decision, Northcoast will have no incentive to pay its debt to NETCO until the Ohio Court Proceeding commences. Thus, once the Commission approves the subject transfer of PCS licenses, NETCO will suffer a concrete and particularized injury, *i.e.*, the loss of any incentive on Northcoast's part to pay any debt to NETCO unless compelled to do so by judicial process in Ohio. This is sufficient to confer standing. *See, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Southwestern Publishing Co v. FCC*, 243 F.2d 829 (1957).

**B. GRANT OF THE SUBJECT APPLICATION WOULD BE INCONSISTENT WITH THE PUBLIC INTEREST**

NETCO continues to assert that its position in the private litigation does not remove NETCO from a position of standing also under the Communications Act to challenge action under it adverse to NETCO's interests. Good faith and fair dealing bear upon the public interest. *Granik v. Federal Communications Commission*, 234 F.2d 682, 684 (DC Cir. 1956).

The Declaration of Martin Cohen, attached to this Reply Brief, is hereby submitted and made a part hereof. Northcoast's refusal to compensate NETCO for earned contract sums has caused NETCO damages in an amount not less than \$600,439.70. *Paragraph 23, Complaint in Ohio Court Proceeding, verified by Declaration of Martin Cohen.* NETCO acknowledges that this is a private interest and that a private interest alone is not for Commission determination. However, NETCO asserts that through this private interest NETCO represents a factor affecting the public interest, namely whether or not this prospective licensee will deal with the public

fairly and in good faith. “Good faith and fair dealing bear upon the public interest” and should be considered in the Commission’s licensing processes. *Granik*, 234 F.2d at 684.

### **III. CONCLUSION**

NETCO submits that, based upon its private dealings with Northcoast, the public will not be well-served if the above-referenced application is approved. Neither the public nor the Commission can depend on the accuracy and truthfulness of Northcoast’s representations. There, the above-referenced application should be denied. In the alternative, NETCO respectfully urges the Commission to defer any action on the assignment and transfer of the control applications referenced herein until the outcome of the Ohio Court Proceeding.

Respectfully submitted,

/s/ Mark E. Avsec

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CELLCO PARTNERSHIP d/b/a	)	
VERIZON WIRELESS	)	

To: The Commission

**DECLARATION OF MARTIN COHEN IN SUPPORT OF REPLY BRIEF OF  
NATIONAL ENGINEERING TECHNICAL COMPANY TO OPPOSITION OF  
NORTHCOAST COMMUNICATIONS, LLC TO PETITION TO DENY OF NATIONAL  
ENGINEERING TECHNICAL COMPANY**

I, MARTIN COHEN, declare as follows:

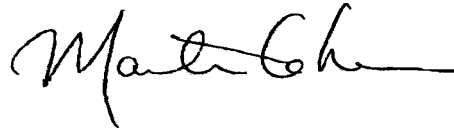
1. I am a permanent resident of the State of Ohio. I make this Declaration based on my own personal knowledge and could competently testify to the matters stated herein if called upon to do so.
2. I am President of National Engineering and Contracting Company, an Ohio corporation.

3. National Engineering Technical Company ("NETCO") is a wholly-owned subsidiary of National Engineering and Contracting Company.

4. Attached as Exhibit A hereto is a true and correct copy of NETCO's Complaint (the "Complaint") against Defendant, Northcoast Communications, L.L.C., CV 03 493090, the original of which was filed on January 30, 2003 in the Cuyahoga County Court of Common Pleas.

5. The facts as alleged in the Complaint are true and correct.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Martin Cohen", written over a horizontal line.

Martin Cohen

Executed this 10<sup>th</sup> day of  
March, 2003 in  
San Francisco, California

**EXHIBIT "A"**

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

NATIONAL ENGINEERING	)	CASE NO.:
TECHNICAL COMPANY	)	
12608 Alameda Drive	)	JUDGE:
Strongsville, Ohio 44136	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
NORTHCOAST COMMUNICATIONS,	)	<b>PLAINTIFF'S COMPLAINT</b>
L.L.C.	)	
c/o statutory agent C.S.C. United States	)	<b>(JURY DEMAND ENDORSED HEREON)</b>
Corporation Company	)	
50 West Broad Street	)	
Columbus, Ohio 43215	)	

Defendant.

Plaintiff, National Engineering Technical Company states by and through counsel, as its complaint against Defendant, Northcoast Communications, L.L.C. as follows:

**PRELIMINARY ALLEGATIONS**

1. Plaintiff, National Engineering Technical Company ("NETCO") is an Ohio corporation for profit organized and existing under the laws of the State of Ohio and at all times has been and continues to be in good standing with the Ohio Secretary of State.

2. Upon information and belief, Northcoast Communications, L.L.C. ("Northcoast") is registered with the Ohio Secretary of State and is licensed to do business in Ohio effective July 1, 1998 as a foreign limited liability company. Upon information and belief, Northcoast maintains its principal place of business in Long Island, New York and holds licenses to provide wireless communications services in 56 markets throughout the United States, including the Cleveland area and various other locations throughout Ohio and the Midwest.

3. Venue is proper in the Cuyahoga County Common Pleas Court because the written Contract that is the subject matter of this action was executed and performed by NETCO in Cuyahoga County, Ohio.

4. On or about October 2, 2000, NETCO entered into a written Contract with Northcoast (the “Agreement”) pursuant to Northcoast’s 1999 build plan to construct various electrical improvements for both new and existing communications towers operated and leased by Northcoast that would upgrade and expand Northcoast’s licenses and related network assets for wireless communication services throughout Ohio and the Midwest (hereinafter the “Project”).

5. The written Agreement dated October 2, 2000 between NETCO and Northcoast sets forth General Terms and Conditions related to the performance of NETCO’s work for Northcoast for the Project. Pursuant to the terms of the General Terms and Conditions, Northcoast agreed to issue Contract Documents on a site-by-site basis, including drawings, specifications, lease agreements, schedule of values, scope of work, time schedules and Northcoast’s Master Construction Specification book.

6. The written Agreement between NETCO and Northcoast for the Project requires that Northcoast pay NETCO no later than sixty (60) days after the Owner’s Representative agrees with the amount invoiced by NETCO and the Owner approves payment on a site-by-site basis. Northcoast further agreed to pay NETCO a 20% retainage on a site-by-site basis upon completion of all punchlist items; submission of all appropriate governmental approvals and inspections; waiver of lien releases; subcontractor proof of payment; original copies of any warranties; and sign-off by Owner’s Representative. NETCO agreed to pay each subcontractor and material supplier upon receipt of payment from Northcoast.



7. NETCO properly performed and Northcoast properly approved and paid NETCO in excess of \$1,000,000.00 to perform various electrical upgrades and new construction for communication towers owned or leased by Northcoast at various locations throughout Ohio and the Midwest. NETCO has fully performed and properly completed all of the communications work Northcoast directed NETCO to perform and approved upon completion, including by way of example, installing Northcoast's first system monopole, installing temporary cell sites and generators and BTS installations for the benefit of Northcoast's expansion of its licenses and related network assets for wireless communication services throughout Ohio and the Midwest.

8. Without notice to NETCO and without any basis to offset or assert any recoupment against the outstanding invoices owed by Northcoast, and without legal excuse, Northcoast abruptly stopped paying NETCO's invoices for work properly performed and approved by Northcoast pursuant to the written Agreement between the parties.

9. NETCO has invoiced Northcoast for all of the work NETCO properly performed at the direction and approval of Northcoast. Northcoast has repeatedly represented to NETCO that all outstanding invoices are approved by Northcoast and awaiting payment to NETCO.

10. NETCO has made repeated demands to Northcoast for payment of the outstanding balance due in the total amount of \$600,439.70 or, in the alternative, that Northcoast agree to a firm payment schedule to discharge the outstanding balance due in the total amount of \$600,439.70 that remains due and owing to NETCO for work properly performed for the direct benefit of Northcoast.

11. Notwithstanding NETCO's repeated demands, Northcoast has failed to propose a firm payment schedule or fully compensate NETCO and there remains an outstanding balance

due and owing to NETCO for work properly performed and approved by Northcoast in the total amount of \$600,439.70.

## **COUNT I**

### **BREACH OF CONTRACT**

12. NETCO incorporates by reference herein, and makes a part hereof each and every averment and allegation previously set forth in Paragraph Nos. 1 through 11 of its Complaint.

13. Since the effective date of NETCO's Agreement with Northcoast for the various projects Northcoast assigned on a site-by-site basis throughout Northcoast's Ohio and Midwest markets, the Agreement has not been terminated and NETCO has fully performed each and every obligation of the Agreement to be performed by it for Northcoast's direct benefit.

14. NETCO predicated its Agreement with Northcoast in full reliance on Northcoast issuing payment to NETCO pursuant to the payment terms set forth in the General Terms and Conditions and in no event more than sixty (60) days after Northcoast approved NETCO's invoices for payment on a site-by-site basis and NETCO provided all support documentation for the release of retention upon final completion.

15. Northcoast, through its authorized agents, directed NETCO to perform construction services required by the Agreement as modified by subsequent change orders issued by Northcoast through its authorized agents on a site-by-site basis, then unilaterally refused to issue payment to NETCO following Northcoast's approval and acceptance of NETCO's work and invoices.

16. As a direct and proximate result of Northcoast's refusal or failure to timely issue payment to NETCO, there remains an outstanding balance due and owing NETCO in the amount of \$600,439.70.

17. Northcoast and its agents failed to perform their contractual obligations to NETCO. As a direct and proximate result of Northcoast's action and inactions, Northcoast has materially breached the terms of the Agreement with NETCO for constructing improvements to Northcoast's wireless communications services in markets Northcoast owns or leases throughout Ohio and the Midwest.

18. Notwithstanding NETCO's repeated demands for payment, Northcoast has materially breached its contractual obligations by unilaterally refusing to compensate NETCO for the undisputed sum due and owing NETCO.

19. As a direct and proximate result of Northcoast's refusal to compensate NETCO for earned contract sums, NETCO has been damaged in an amount not less than \$600,439.70, exclusive of prejudgment interest, attorney fees and the costs of this action.

## **COUNT II**

### **UNJUST ENRICHMENT**

20. NETCO incorporates by reference herein and makes a part hereof each and every averment and allegation previously set forth in Paragraph Nos. 1 through 19 of this Complaint as if fully rewritten herein.

21. NETCO has incurred losses, costs and expenses in expending time, labor, materials, equipment and services on the various communication upgrades and improvements NETCO constructed for the Projects owned or leased by Northcoast, as set forth in Paragraph Nos. 1 through 20 for which it has not been justly compensated.

22. Northcoast has been unjustly enriched at NETCO's expense.

23. By virtue of the foregoing, NETCO is entitled to recover from Northcoast the reasonable value of its performance which is an amount not less than \$600,439.70, exclusive of prejudgment interest, attorney fees and the costs of this action.

**COUNT III**

**ACCOUNT STATED**

24. NETCO incorporates by reference herein and makes a part hereof, all of the averments and allegations of Paragraph Nos. 1 through 23 of this Complaint as if fully rewritten herein.

25. There have been business transactions between NETCO and Northcoast arising out of the written Agreement dated October 2, 2000.

26. NETCO's Invoice Register for the period from December 1, 1999 to December 31, 2002, and attached to NETCO's Complaint as Exhibit "B," itemizes by the invoice number, date, description of work and invoiced amount a summary of the course of business dealings between NETCO and Northcoast for improvements to Northcoast's wireless communication installations and services and establishes that Northcoast has a matured debt that is overdue and outstanding NETCO.

27. As a direct and proximate result of Northcoast's failure to pay NETCO without any legal excuse or justification the matured debt owned by Northcoast to NETCO, the sum of \$600,439.70 remains due and owing to NETCO on its account stated, exclusive of prejudgment interest, attorney fees and the costs of this action.

WHEREFORE, NETCO demands judgment against Northcoast in an amount not less than \$600,439.70 on Counts I, II and III of NETCO's Complaint and for such other further and legal and equitable relief, including, but not limited to, prejudgment interest at the statutory rate of 10% per annum beginning 61 days after Northcoast approved of NETCO's invoice(s) and continuing to the date of judgment; post judgment interest, attorney fees', the costs of this action and such further legal and equitable relief as this Court deems just and proper.

**JURY DEMAND**

Pursuant to Ohio Civil Rule 38 Plaintiff National Engineering Technical Company respectfully requests a trial by jury on all issues raised in Plaintiff's Complaint.

Respectfully submitted,

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*Attorneys for Plaintiff National Engineering  
Technical Company*

### **CERTIFICATE OF SERVICE**

I, Mark Avsec, an attorney in the law firm of Benesch, Friedlander, Coplan & Aronoff LLP, hereby certify that I have this 10<sup>th</sup> day of March, 2003, caused to be sent by facsimile or email, a copy of the foregoing “Reply Brief of National Engineering Technical Company to Northcoast Communications, LLC’s Opposition to National Engineering Technical Company’s Petition to Deny” to the following:

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/s/ Mark Avsec

MARK AVSEC

March 10, 2003

\* Via email

# Via facsimile